U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: NOV 27 2009

LIN 07 216 53840

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected as untimely filed pursuant to 8 C.F.R. § 103.3(a)(2)(v)(B)(1).

The petitioner claims to be a home health business. It seeks to permanently employ the beneficiary in the United States as a registered nurse/case manager. The petitioner requests classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). The petition is accompanied by a labor certification submitted on Form ETA 750, Application for Alien Employment Certification.

The director denied the petition on March 5, 2008. The decision states that the petitioner submitted the labor certification on the incorrect form;[1] the offered position does not require an advanced degree professional; the offered position on the petition is inconsistent with the offered position set forth on the labor certification; and the petitioner did not establish its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The decision properly gave notice to the petitioner that it had 33 days to file the appeal.

The petitioner submitted the appeal on April 8, 2008, 34 days after the decision was issued and without the required $585.00 filing fee. The regulation at 8 C.F.R. § 103.2(a)(7)(i) requires U.S. Citizenship and Immigration Services (USCIS) to reject any petition or application filed with the incorrect filing fee. Therefore, the director rejected the appeal for failure to provide the required fee. The petitioner resubmitted the appeal on April 22, 2008. Since the initial submission did not include a filing fee, it did not retain a filing date. Accordingly, the filing date for the appeal is April 22, 2008, 48 days after the decision was issued.[2]

In order to properly file an appeal, the regulation at 8 C.F.R. § 103.3(a)(2)(i) provides that the affected party must file the complete appeal within 30 days after service of the unfavorable decision. If the decision was mailed, the appeal must be filed within 33 days. *See* 8 C.F.R. § 103.5a(b). The date of filing is not the date of mailing, but the date of actual receipt by USCIS. *See* 8 C.F.R. § 103.2(a)(7)(i). Neither the Act nor the pertinent regulations grant the AAO authority to extend the 33-day time limit for filing an appeal. The regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(1) states that "[a]n appeal which is not timely filed within the time allowed must be rejected as improperly filed."

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[1]Effective March 28, 2005, DOL required all labor certifications to be filed on ETA Form 9089, Application for Permanent Employment Certification. 69 Fed. Reg. 77325 (Dec. 27, 2004). The petitioner filed the instant petition on June 29, 2007, using the old Form ETA 750, Application for Alien Employment Certification.

[2]Even if the appeal submitted on April 8, 2008 contained the required filing fee, it still would have been rejected as untimely filed as it was filed 34 days after the decision was issued.

Nevertheless, the regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(2) states that, if an untimely appeal meets the requirements of a motion to reopen or a motion to reconsider, the appeal must be treated as a motion, and a decision must be made on the merits of the case.

A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or policy. 8 C.F.R. § 103.5(a)(3). In addition, a motion to reconsider must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. *Id.* A motion that does not meet these requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

The appeal does not meet the requirements of a motion to reopen. On appeal, the petitioner does not offer sufficient new facts to address the multiple grounds of the denial. Likewise, the petitioner fails to cite to any pertinent precedent decisions establishing that the director's decision was an incorrect application of law or policy.

Therefore, the appeal must be rejected pursuant to 8 C.F.R. § 103.3(a)(2)(v)(B)(1).

ORDER: The appeal is rejected.